

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

**David McGee, Jacob Sexton,
Richard Pahl, Jose Torres,
Kevin Kimber, Daniel Muir,
James Anderson, and all other
inmates similarly situated,**

Plaintiffs,

v.

File No. 1:04-cv-00335

**Andrew Pallito, Commissioner,
Vermont Department of Corrections,
Robert Hofmann, Keith Tallon,
Celeste Girrell, John Gorczyk,
Kathleen Lanman, Michael O'Malley,
Anita Carbonnel, Stuart Gladding,
Daniel Florentine, Raymond Flum,
and Carol Callea,**

Defendants.

ORDER

The Magistrate Judge's Report and Recommendation ("R&R") filed August 3, 2010 (Doc. 276) recommends Defendant Andrew Pallito's Motion for Summary Judgment (Doc. 238) be granted, the Plaintiff Class's Eighth Amendment claim under 42 U.S.C. § 1983 be dismissed with prejudice, and its state law claim under the Vermont Constitution be dismissed without prejudice. The R&R further recommends Defendant Commissioner and Vermont Department of Correction's Renewed Motion to Reconsider the Court's October 1, 2009 Order and Renewed Motion for Summary Judgment (Doc. 251) be denied as moot. Appointed counsel for the Plaintiff Class did not file any objection to the R&R.

On September 30, 2010, this Court ordered a copy of the R&R be mailed to each of the Class representatives and set a new deadline for filing objections. Plaintiffs Kevin Kimber and David McGee each filed timely pro se objections. (Docs. 284, 286.) Defendant Andrew Pallito, Commissioner of the Vermont Department of Corrections, filed a Response to the Objections on October 29, 2010. (Doc. 287.) This Court has reviewed the R&R, the Objections, and Defendant's Response de novo and finds the objections to be without merit. See Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b) (requiring district court to determine de novo any part of the magistrate judge's disposition for which objections have been properly made).

Judge Conroy has thoroughly analyzed the factual and legal issues surrounding the Plaintiff Class's claim under 42 U.S.C. § 1983 that night-time security lighting in prison cells caused harm to prisoners' physical and mental health in violation of the Eighth Amendment, and its claim under the Vermont Constitution that the constant illumination violated prisoners' right to be free from cruel and unusual punishment.

The Office of the Vermont Defender General, Prisoners' Rights Office was appointed to represent the Class and filed the Second Amended Complaint (Doc. 195) seeking only declaratory and injunctive relief for the Class, because it is not authorized to pursue claims for damages. It did so without prejudice to the pro se Plaintiffs' individual damages claims based on constant illumination contained in the Amended Complaint filed October 3, 2005 (Doc. 99). See Minute Entry reflecting recorded telephone status conference held before Judge Jerome J. Niedermeier on April 17, 2006, ECF No. 174. The R&R notes that its recommendations regarding

Defendants' liability for the Class claims dispose of the Defendants' liability regardless of the form of relief being sought and suggests that the entire case can be dismissed. However, this Court declines to sua sponte grant summary judgment on the surviving individual damages claims. There is no motion before the Court on behalf of any Defendant addressing the individual damages claims, and the individual Plaintiffs are not represented by counsel. Furthermore, pro se plaintiffs require notice and an opportunity to respond before a court can rule on such a motion.

For these reasons, the Magistrate Judge's Report and Recommendation is AFFIRMED, APPROVED and ADOPTED. See 28 U.S.C. § 636(b)(1). It is hereby ORDERED as follows:

1. The Defendant's Motion for Summary Judgment (Doc. 238) on claims contained in the Second Amended Complaint is GRANTED. The Eighth Amendment Class claim for declaratory and injunctive relief is DISMISSED with prejudice. The state law Class claim is DISMISSED without prejudice.

2. The Defendants' Renewed Motion to Reconsider the Court's October 1, 2009 Order and Renewed Motion for Summary Judgment (Doc. 251) is DENIED as moot.

3. The remaining Defendants may file a motion for summary judgment on the Plaintiffs' individual claims for damages on or before January 31, 2011.

4. The caption of any pleading filed with the Court shall identify the remaining parties as set forth in this Order.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 20th day of
December, 2010.

/s/ J. Garvan Murtha
Honorable J. Garvan Murtha
Senior United States District Judge